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Docket No. 82-446

In The

Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and MARTIN GREITZER; NEIL R. PETERSON,

Petitioners,

v.

RAYMARK INDUSTRIES, INC.;
PITTSBURG CORNING CORPORATION;
H. K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION;

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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*Respondents.**

STATEMENT OF THE CASE

District Court Proceedings

This appeal emanates from the asbestos litigation pending in the Norfolk and Newport News Divisions of the United States District Court for the Eastern District of Virginia. On November 26, 1980, several of the defendant-manufacturers moved to disqualify Neil R. Peterson and the Philadelphia law firm of Greitzer & Locks from further representation of plaintiffs in the Virginia litigation. (Record 43.)**

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*The following respondents named in petitioners' petition for Writ of Certiorari have declined to join this Brief in Opposition: Johns-Manville Corporation and Johns-Manville Sales Corporation (pending bankruptcy stay pursuant to 11 U.S.C. § 362); Eagle-Picher Industries, Inc.; UNARCO Industries, Inc.; The Celotex Corporation; Keene Corporation. The names of the above-mentioned corporations, subsidiaries and sub-subsidiaries have been filed with the Fourth Circuit Court of Appeals in the case below and are to be adopted pursuant to Rule 28.1 of the United States Supreme Court Rules.

**Record (R) refers to Appendix filed in the United States Court of Appeals for the Fourth Circuit.

Oral argument on the disqualification motion was held January 27, 1981 (R. 124), and an evidentiary hearing was held on February 27, 1981. (R. 252.) By Order and Opinion dated April 6, 1981 (R. 540), and by Amended Order and Opinion dated May 6, 1981 (R. 574), the three active status judges of the District Court unanimously ordered that Peterson and the firm of Greitzer & Locks be disqualified from further participation in the Virginia asbestos litigation. Only the disqualified lawyers filed a notice of appeal from those decisions. (R. 572, 600.)

Fourth Circuit Court of Appeals Proceedings

On appeal to a Three Judge Panel of the United States Court of Appeals for the Fourth Circuit, the majority in a split decision, reversed the District Court's disqualification of Greitzer & Locks as to actions against the manufacturers by Opinion dated March 5, 1982. Some of the manufacturers sought a Petition for Rehearing En Banc, which was granted April 23, 1982. Oral argument was heard by the Fourth Circuit Court of Appeals, sitting *en banc*, June 6, 1982. The full Court affirmed the District Court's Order of Disqualification by an equally divided court by Order of June 17, 1982.

This brief is filed in response to the disqualified lawyer's Petition for a Writ of Certiorari.

Facts

After many years of trial work for the Department of Justice, Peterson was promoted to supergrade status as Special Litigation Counsel on September 21, 1977. He retained that position until his resignation on October 3, 1980. As Special Litigation Counsel, Peterson also had direct responsibility for the defense of the United States in the Virginia asbestos litigation with respect both to direct ac-

tions brought against the United States by plaintiffs and third-party actions brought by defendants against the United States. (R. 576, 601.) He personally conducted most, and directed and supervised all, of (1) the Virginia asbestos litigation as to pretrial investigation and discovery, (2) legal and scientific research, (3) development of legal theories and strategies, (4) examination of documents, (5) preparation of factual and expert witnesses, (6) preparation of pleadings and briefs, (7) oral argument of motions and appeals, (8) deposing of adverse witnesses, (9) deposing of former and present government employees, (10) preparation of cases for trial, and (11) actual trial. (R. 50-53, 102-108, 576-577, 601, 616-617.)

Moreover, Peterson was the national coordinator of asbestos litigation for the Government from September 21, 1977, through October 1, 1979. As such, he was involved in reviewing "all correspondence dealing with substantive matters, strategy and tactical planning, all answers to interrogatories, and all pleadings and motions" for the Government on a national basis. (R. 601.) As coordinator "Mr. Peterson also required his prior approval of all requests to client agencies for litigation assistance and contacts with prospective witnesses, acted as spokesperson to the press and public, and acted as liaison officer and counselor to clients agencies." (R. 601.)

In addition to these functions, Peterson also represented the Government in asbestos concerns related to: (1) legislative matters, including commentary on proposed legislation, lobbying with Congress, attending Congressional hearings, and preparing government personnel and documentation for presentations to congressional committees; (2) personal representation of two federal Maritime Commission employees during their discovery depositions; (3) responding to

Freedom of Information Act (FOIA) requests directed to the Department of Justice and advising the United States Navy on its responses to FOIA requests; (4) advising the Navy "concerning the preservation, collection and indexing of asbestos-related documents;" and (5) coordination of the Government's discovery efforts at Navy shipyards in California and South Carolina (R.104-105.)

During Peterson's tenure as Special Litigation Counsel, he had personal involvement in asbestos litigation in Louisiana, Texas, Pennsylvania, and Massachusetts as well as Virginia. (R. 102-103.) Similarly, his coordinator duties involved him in asbestos litigation in Connecticut, Illinois, Massachusetts, Pennsylvania, California, South Carolina and New Jersey. (R. 103-105, 601-603.)

By early as January of 1980, Peterson began to seek new employment. (R. 316.) Upon learning that Peterson planned to leave the government, Gene Locks sought him out and hired him as a salaried associate. (R. 358, 372.) Peterson began work for Greitzer & Locks October 6, 1981. Greitzer & Locks specifically hired Peterson because of his experience and knowledge of asbestos-related litigation. (R. 578, 358, 367, 69). Peterson was immediately assigned to work on various asbestos cases pending in Pennsylvania and a motion was filed for him to appear in the New Jersey litigation.[1] (R. 72-73, 366-368, 95, 106.)

Greitzer & Locks is a six person law firm located in Philadelphia, Pennsylvania. (R. 350, 678.) As of April 23, 1981, the firm served as co-counsel of record representing 260 of the 333 individual plaintiffs in the Virginia asbestos litigation.

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[1] According to Peterson's counsel, after the Government expressed concern over Peterson's participation in New Jersey, the motion for him to appear was withdrawn. (R. 95.)

Nationwide, as of the date Peterson was hired, Greitzer & Locks was associated in the representation of more than 1,500 plaintiffs in asbestos-related litigation. (R. 68.) Approximately 40% of these cases involved shipyard workers and many of the remainder involved plant workers. (R. 69.)

In September, 1980, Peterson notified the Government of his intention to join Greitzer & Locks, of his intention to participate in asbestos litigation outside Virginia, and of his intention to interpose an intra-firm "screen," purportedly shielding him from involvement in the Virginia litigation. In view of the screening mechanism, Peterson asked the government to waive vicarious disqualification of Greitzer & Locks from participation in the Virginia asbestos litigation. (R. 101-109.) Peterson began his employment with Greitzer & Locks without a waiver, or assurance of a waiver.

Subsequent to Peterson's initial request for waiver, the Department of Justice circulated a letter to its various client agencies for comments or objections to Peterson's proposal. (R. 601-602, 738-740.) A follow-up letter attached copies of two memoranda submitted by Peterson to the Department of Justice. (R. 740, 100-112.) In response to these inquiries several client agencies expressed grave concern over Peterson's proposal and disagreed vehemently with the premises and assumptions upon which Peterson based his request for waiver.

Faced with these unfavorable comments, Peterson's counsel, during the week of December 29, 1981, met with representatives from the Civil Division and Office of Legal Counsel of the Department of Justice[2] to persuade them to issue some type of waiver, and to issue it quickly, before the hearing on the Motion to Disqualify Peterson, Greitzer

[2] The defendant-manufacturers who had filed the Motion to Disqualify were not given notice of this meeting and did not attend.

& Locks then set for January 27, 1981. (R. 344-45.) In order to get some type of waiver issued, Peterson agreed to a broader and more stringent screening than supposedly was in effect since his joining Greitzer & Locks on October 6, 1981. The new screening is found in Peterson's lawyer's six-page, single-spaced letter to the Civil Division dated January 7, 1981. (R. 92-98.) Unlike Peterson's first proposal, the January proposal was not circulated in writing to the client agencies for comment. Rather, the six-page document was read to the client agencies by telephone on January 7 or January 8, in order that some type of conditional waiver could be issued in time for the January 27 hearing. (R. 344-345.)

The Motion to Disqualify was then orally argued with Judge Clarke presiding, who informed the parties that although he was hearing the argument, all three active status judges would rule on the matter. This procedure was decided upon the day before the hearing since all the judges were going to adjudicate asbestos trials, and all of the judges believed that it would be improper for only one judge to decide the issue. (R. 130-131.)

During the course of the hearing, counsel for Mr. Peterson contested the accuracy of the affidavits filed on behalf of the defendant-manufacturers. In view of the fact that the Motion to Disqualify was not the type of motion which can proceed upon disputed affidavits (*e.g.* FED. R. CIV. P. 56), the Court asked counsel for Peterson if they wanted an evidentiary hearing and received an affirmative response. (R. 183.) Judge Clarke granted that request and ordered an evidentiary hearing because the Court did not want to make a ruling of law when the facts were in dispute. (R. 214-219.) The Court notified the parties that all three judges would preside over the evidentiary hearing. (R. 214.)

During the argument, the Court expressed concern that Peterson's participation in cases emanating from the Philadelphia Naval Shipyard might erode the effectiveness of the Virginia screen. In response, the disqualified lawyers offered to screen Peterson from those cases for a period of two years if the Court would not disqualify Greitzer & Locks. (R. 214, 237-239, 268-269.) This type of screen had not been a part of Peterson's initial screening proposals.

At the evidentiary hearing held February 27, 1981, the defendants introduced evidence concerning confidential information about the manufacturers and the government which Peterson knew, or was presumed to know, because of his access to that information and/or his subordinates' direct knowledge of it. The defendants' exhibits establish the following:

(1) Proprietary information about the manufacturers was disclosed to the Navy Bureau of Medicine & Surgery with the understanding that it remain confidential. Peterson had access to this information and his subordinates had direct knowledge of it. (R. 778);

(2) Peterson's subordinates were privy to the manufacturers' interviews of government witnesses which were to remain confidential, and Peterson discussed the interviews with his subordinates. (R. 776-777, 323-325);

(3) Peterson was given a copy of the amounts each defendant contributed to the *Glover* settlement with the plaintiffs. (R. 779, 326);

(4) Peterson and his subordinates reviewed and withheld numerous government documents and infor-

[a] This case, *Glover* v. *Johns-Manville Corp., et al.*, C.A. No. 78-648-N (E.D. Va. 1978) was settled in 1978. Mr. Glover was employed by the Norfolk Navy Shipyard in the Pipe Coverers Department. His complaint alleged he contracted asbestosis due to his exposure to asbestos-containing products.

mation during discovery on grounds of privilege, litigation strategy, work product, national security, relevancy and materiality. (R. 309-310.)

Peterson either knew or had access to the above-referenced information during his tenure as Special Litigation Counsel and asbestos coordinator. This information had not been previously available to the plaintiffs.

In light of the evidence presented at the evidentiary hearing, the three active status judges of the District Court unanimously disqualified both Peterson and Greitzer & Locks from further participation in the Virginia litigation. This action was taken on the grounds that the proposed screening could not adequately protect against potential disclosures of information from Peterson to Greitzer & Locks which would be prejudicial to the United States. The Court found that a threat to the integrity of the Virginia litigation and an impermissible appearance of a significant professional impropriety existed, without having to address the evidence pointing to a prejudicial impact upon the manufacturers.

ARGUMENT

I. The Petition For Writ Of Certiorari Should Be Denied Because This Court Lacks Subject Matter Jurisdiction And Petitioners Lack Standing.

On August 26, 1982, Johns-Manville Corporation filed Chapter 11, Reorganization proceedings in the Bankruptcy Court in the Southern District of New York.

Johns-Manville's filing under Chapter 11 of the Bankruptcy Act removes subject matter jurisdiction from this Court over all aspects of this case. Title 11 U.S.C. § 362 (a)(1) stays automatically all proceedings against "all entities" affected, i.e. Johns-Manville and all of the other defendants remaining in this cases.

11 U.S.C., § 362(a) provides:

> "A petition . . . operates as a stay to all entities, of
>
> (1) . . . proceeding against the debtor or other proceeding against the debtor that was commence[d] . . . or to recover a claim against the debtor that arose before the commencement of the case under this title. . . ."

The stay of the Bankruptcy Court continues in effect until terminated by other provisions of Section 362, none of which have yet occurred. While there are exceptions to the application of the automatic "stay upon filing" in section 362(b) of the Bankruptcy Act, none of the stated exceptions are applicable to vitiate the Johns-Manville stay. The one remaining exception to the stay is a request for relief from the stay. 11 U S.C. 362(d).

The language of Section 362, controlling herein, is the provision that the stay is "applicable to all entities." Co-defendants and the debtor benefit equally by this language. This has been explicitly recognized in *In Re White Motor Credit Corp.*, 11 Bankr. Rep. 294 (N.D. Ohio 1981), where the Court recognized the stay in some 160 products liability actions pending across the United States. The pertinent language underscores the staying of *all* actions against *all* defendants:

> All of the products liability suits have been effectively stayed by the operation of § 362 of the Code, 11 U.S.C. § 362(a). This section operates as a stay, applicable to all entities, of the commencement or continuation of a judicial proceeding against the debtor that was or could have been commenced before filing of the reorganization. 11 U.S.C. § 362(a)(1). Section 362 operates to stay as well the "employment of process," e.g. discovery requests, preservation of testimony, seeking entry of judgment after a successful appeal, or service

> of process and joinder of parties thereby. Importantly, *the stay operates as a windfall benefit to co-defendants* and insurance companies *who, along with debtor, enjoy many of the benefits of the moratorium.* Nevertheless, for many reasons (perhaps including § 362 itself), products liability plaintiffs cannot dismiss a reorganization debtor and proceed against co-defendants only. Actions taken in violation of the stay are without effect." *Id* at 295. (Citations omitted.) (Emphasis added.)

In *Federal First Life Ins. Co. (Mutual)* v. *First Financial Group of Texas, Inc., et al.*, 3 Bankr. Rep. 375 (S.D. Tex 1980) the district court refused to sever a claim against one of three joint tortfeasors. The court held that because the allegation against the three defendants were ". . . inextricably interwoven, presenting common questions of law and facts, which can be resolved in one proceeding" the stay of the action against one party requires the stay against the others. 3 Bankr. Rep. 375, at 376. The defendants and the issues of law in these present cases are so interwoven that it would be prejudicial to the defendants to proceed with this case without Johns-Manville.

The prejudicial effects of continuing against some co-defendants but not the debtor are recognized in *White Motors* and are used as reasons supporting the stay as to all defendants. Reasons advanced include substantial uncertainty and chaos to the rights of all parties concerned, the possibility of multiple court actions, and the risk of loss or serious challenge to various insurance coverages.

The disqualified lawyers should be denied their petition because they are not parties to this suit. The Supreme Court of Illinois has determined that a disqualified lawyer does not have sufficient justiciable interest in the merits of a case to confer standing to appeal. *Almon* v. *America Carloading*

Corporation, 380 Ill. 524, 44 N.E.2d 592, 595-96 (1942). The Illinois Court specifically held that a legal fee is not a sufficient interest to create standing to appeal.

II. This Court's Scope Of Review Is Limited To Determining Whether The District Court Abused Its Discretion In Disqualifying Greitzer & Locks.

It is evident from the record below and the various briefs filed in this matter that the facts are hotly contested. In petitioner's brief, the disqualified lawyers repeatedly take issue with the facts as found by the District Court. Similarly, the disqualified lawyers dispute the validity of the manufacturers' evidence establishing that Peterson knows and/or had access to confidential information about these defendants and the government which would be prejudicial to the manufacturers if transmitted to Greitzer & Locks.

In view of this factual dispute, and the prevailing law in most Federal Circuits, this Court's scope of review is limited to finding an abuse of discretion. *See, e.g., Aetna Casualty & Surety Co.* v. *United States*, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); *Cheng* v. *GAF Corp.*, 631 F.2d 1052, 1055 (2d Cir. 1980); *vacated on other grounds*, 450 U.S. 903, (1981); *Gas-A-Tron* v. *Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir.) (per curiam), *cert. denied*, 429 U.S. 861 (1976). This standard of review is based on the recognition that disqualification orders are issued pursuant to the authority of the District Court to supervise the ethical conduct of attorneys who practice before it. Indeed, "[t]he primary responsibility for controlling the conduct of lawyers practicing before the district court rests with that court." *Trone* v. *Smith*, 621 F.2d 994, 999 (9th Cir. 1980). The District Court, because of its fact finding capabilities, is in the best position to determine if any

appearance of impropriety exists. Consequently, in cases involving factual disputes, appellate courts will not reverse a disqualification order unless an abuse of judicial discretion can be identified.

In the instant case, there was no abuse of judicial discretion. As is demonstrated by the following, the District Court's findings of fact are amply supported by the evidence and the disqualification order was based upon sound legal precedent and ethical considerations.

III. The District Court Was Correct In Its Disqualification Of Peterson In The Virginia Asbestos Litigation.

It is conceded by petitioners in their brief that Peterson is and should be disqualified from participation in the Virginia asbestos litigation based upon the findings of fact by the District Court. (Petitioners' Brief 16.) This assessment of the District Court was based upon the following factors:

(1) The defendant manufactures would be highly prejudiced in the Virginia asbestos litigation because:

(a) Peterson had access to Government files and information sought by defendant's Requests for Production and Interrogatories. Defendants were denied access to these materials because of the Government's objections based upon attorney-client privilege and work product.

(b) Peterson had knowledge of defendant's trial tactics, strategies and the assessment of their legal position.

(c) He was included in the manufacturers settlement negotiations in the *Glover* case and was privy to the settlement breakdown to each manufacturer.

(d) He possessed the confidences of the United States.

(e) In his position with the government, the knowledge of his subordinates was imputed to him. *United States* v. *Standard Oil*, 136 F. Supp. 345, 354, 362 (S.D.N.Y. 1955).

(2) Peterson switched sides in the midst of the pending litigation.

(3) The Virginia litigation is complex, protracted and involves hundreds of plaintiffs and millions of dollars.

(4) Peterson negotiated with Greitzer & Locks while still employed by the Government without seeking prior approval from the court or other parties in the case.

(5) Only two days separated Peterson's status as lead counsel for the Government and his employment with Greitzer and Locks.

(6) Peterson was hired as a salaried employee to work specifically on asbestos cases similar to the Virginia cases.

All parties concede Peterson's participation in the Virginia litigation would subject him to the sanctions of the Ethics in Government Act, 18 U.S.C. § 207. He is also ethically prohibited from such participation by Canon 9 and the mandatory prohibition of DR 9-101(B).[4] This rule states:

> A lawyer shall not accept employment in a matter in which he had substantial responsibility while he was a public employee.

[4] Canon 9 states that "[A] lawyer should avoid even the appearance of professional impropriety." Ethical Consideration (EC) 9-3 notes that the reason for the mandatory prohibition of DR 9-101 (B) is that the proscribed conduct "would give the appearance of an impropriety even if none exists."

In this factual situation, for Peterson to accept such employment would clearly give the public the appearance of professional impropriety. The District Court found as a matter of fact that Peterson's involvement with the Government ethically prohibited him from switching sides and representing the plaintiffs in the same litigation. This holding is unquestionably supported by every legal and ethical precedent cited by either party. *See e.g., Trone* v. *Smith, General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975).

IV. Given The Factual Situation, Neither The Waiver Of Imputed Disqualification Nor The Purported Screen Are Sufficient To Prevent The Appearance Of Impropriety From Inuring To Greitzer & Locks.

Because Peterson must be disqualified under the tenets of Canon 9 and DR9-101(B), Disciplinary Rule 5-105(D) requires generally that any law firm affiliated with a disqualified attorney be likewise disqualified from continued participation in the same litigation.[8] It would appear under these ethical requirements of the America Bar Association, that any government attorney would be unable to enter private practice for fear of disqualifying his new firm. To remove this paradox, the American Bar Association Committee on Ethics and Professional Responsibility issued Formal Opinion 342 (November 24, 1975) (hereinafter Formal Opinion 342) (App. O at A-168), in which it outlined

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[8] DR 5-105 (D) states:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, no associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

the requirements of an exception whereby government lawyers could avoid imputed disqualification of the private firm.

The first of these requirements is a *waiver* of imputed disqualification. Such waiver amounts to the Government's consent to the leaving lawyer to step into the world of private practice. However, as a prerequisite for such waiver, the Government must be assured a second requirement is met, that of a suitable "screen." Such a suitable screen is one which prevents the passage of any knowledge to the other members of the firm that may be prejudicial to any adverse party. If such a screen is effectuated, and a waiver of vicarious disqualification is issued, Formal Opinion 342 grants the one exception to imputed disqualification. Without considering the requirements for an exception to vicarious disqualification, the petitioners argue against the imputed disqualification of Greitzer & Locks in the Virginia asbestos cases. To do so ignores the knowledge of Peterson, and now Greitzer & Locks, the size of the firm of Greitzer & Locks, and the nature of the litigation. The preventative measures purportedly taken by the disqualified lawyers do not destroy the significant appearance of professional impropriety since they came at best after the fact, and the potential for taint had already begun.

The exception to the imputed disqualification rule is not automatic even if waiver and screens are in existence. Each case of imputed disqualification is *sui generis* and must be regarded on a case by case basis. *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981). At the time Peterson joined the disqualified lawyers' firm, there had been no waiver of imputed disqualification issued by the Government. Thus it is clear that Greitzer & Locks must be dis-

qualified from the Virginia litigation, Formal Opinion 342 notwithstanding.

A. The Screen Is Insufficient To Stop Peterson's Knowledge Of The Virginia Litigation From Tainting Greitzer & Locks.

In September, 1980, Peterson notified the Government of his intention to join Greitzer & Locks, of his intention to participate in asbestos litigation outside Virginia, and of his intention to establish an intra-firm "screen" which purportedly would shield him from involvement in the Virginia litigation. Peterson also asked the Government to waive imputed disqualification of Greitzer & Locks from participation in the Virginia asbestos litigation. (R. 101-112.)

Following Peterson's request for waiver, the Department of Justice circulated a letter to the various client agencies Peterson had represented for comments or objections to Peterson's proposal (R. 601-603, 738-740.) A follow-up letter attached copies of two memoranda submitted by Peterson to the Department of Justice. (R. 740, 100-112.)

In response to these inquiries, several client agencies expressed grave concern over Peterson's proposal and disagreed with the reasons upon which Peterson based his request for waiver. By letter of December 3, 1980, the General Services Administration (GSA) stated:

> I am writing in response to your letter of October 30, 1980, which requests GSA's position on the above-referenced matters. In the September 10, 1980 letter, Mr. Peterson states, "I would assume that having participated in a case . . . which participation was limited to securing a dismissal for failure to file an administrative claim and involved no activity on the merits of the litigation, would not bar me from later participation in the private sector in merits litigation." We disagree.

Mr. Peterson is attempting to apply a narrow focus to the situation. However, he was coordinator of all asbestos litigation, and therefore, we cannot adopt his narrow view.

Mr. Peterson was Special Litigation Counsel for 3 years, approximately 2 of which he spent as coordinator of all asbestos litigation. In fact, Mr. Peterson states that he was "strategy coordinator of asbestos litigation against United States." As such, his position would refute his statement that he has ". . . no 'inside' knowledge concerning any agency of the United States in relation to asbestos issues, either documentary or mental. . . ."

As "strategy coordinator," he would be privity to inside, special information, as well as trial strategy used in the asbestos cases. Since most asbestos cases concern similar legal and factual issues, Mr. Peterson is knowledgeable on the strategy position that the Government presently takes and will probably take on all cases (whether or not Mr. Peterson personally handled them).

We are also sending you a list of documents which would refute Mr. Peterson's statement that he has no inside knowledge. We have included correspondence addressed to others with copies to Mr. Peterson; correspondence sent to attorneys at the Department of Justice between September 21, 1977, and October 1, 1979; and papers written by Mr. Peterson.

* * *

Finally, we cannot agree with Mr. Peterson's statement, "In all such cases [where the U.S. is a third-party defendant], the interest of the plaintiffs and the United States coalesce, since plaintiffs do not want manufacturers to evade responsibility by blaming the United States and thus escaping liability to them." The United States' interest, as a third-party defendant, would not coalesce with that of plaintiffs. (R. 605-608.)

Similarly, the Department of Health and Human Services expressed concern over the proposal screening.

> Based on our lengthy association with Mr. Peterson in preparation for the defense of asbestos cases in which this Department is or may be a defendant we have the following concerns about Mr. Peterson's current activities:
>
> > Mr. Peterson has had free and complete access to records of this Department regarding the effects of asbestos.
> >
> > He has had immediate and constant contact with employees of this Department who are experts in this area of science.
> >
> > In personal meetings and interviews with scientific employees of this Department, who will in all likelihood be witnesses in these cases, he had in many cases established a close working relationship and unique rapport. Thus, he had been able to assess the strengths and weaknesses of our position and to even formulate the manner in which the factual and scientific portion of the cases will be presented.
>
> Consequently, we have serious reservations about the propriety of Mr. Peterson's continued activities in these cases because our collaboration with Mr. Peterson seems to warrant a conclusion that an attorney-client relationship existed between Mr. Peterson and possible witnesses in these cases who are employed by this Department. (R. 609-610.)

By letter of December 4, 1980, the Department of Labor responded, stating:

> [W]e know of no confidential information supplied to Mr. Peterson in connection with asbestos litigation.

> However, we cannot be positive that no such information was supplied. In any event, our concern would not be so much with specific information on specific cases as it would be with Mr. Peterson's knowledge, gained as a result of his employment with the Department of Justice, of the Government's tactics and strategy in asbestos litigation. We feel that Mr. Peterson must be as familiar with the Government's tactics and strategy, and its strengths and weaknesses, and what it can and cannot prove as anyone. It is our opinion that all of this must be considered in considering Mr. Peterson's request. (R. 611.)

All three agencies felt Peterson's proposed screen was not sufficient in light of his extensive knowledge of the Government's tactics and strategies. (R. 609-610, 611.)

A fourth client agency, the Department of the Navy, by letter dated December 3, 1980 stated that while it had no objection to the proposed screening, it was concerned over Peterson's participation in (1) asbestos cases in which Government attorneys whom he supervised were involved and (2) any cases involving present or former employees of naval shipyards. (R. 122.) Unfortunately, Peterson had by then already made the switch without the waiver.

The Office of Legal Counsel for the Department of Justice (OLC) was also asked to comment on the matter, and it too voiced concerns. In its response to the Civil Division, OLC noted that, when Peterson acted in a supervisory capacity, he may have had substantial personal participation. This observation was based on the examples supplied by the Civil Division, which seemed "to indicate that when Peterson supervised a case, he participated in it personally and substantially because his style of supervision was fairly detailed and rigorous." (R. 116.) Furthermore, OLC commented that in view of the scope of Peterson's involvement

in asbestos litigation, it seemed "likely that he has obtained numerous client confidences" from the various government agencies. (R. 120.)

Faced with these unfavorable comments, Peterson's counsel, during the week of December 29, 1981, met with representatives from the Civil Division and OLC, to persuade them to issue some type of waiver, and to issue it quickly, before a hearing on the Motion to Disqualify then set for January 27, 1981. (R. 344-45.) The Government finally agreed, but not before Peterson had to agree to new, broader, and more stringent screening than was supposedly in effect since joining Greitzer & Locks on October 6, 1981.* The new screening was memorialized in Peterson's lawyer's six-page, single-spaced letter to the Civil Division dated January 7, 1981. (R. 92-98.) Based upon Peterson's promise to initiate these additional safeguards, the Department of Justice finally waived the imputed disqualification of Greitzer & Locks in the Virginia litigation.

This waiver came ninety days after the fact and amounted at best to the proverbial locking of the barn after the escape of the horse. Disciplinary Rule 5-105(D) recognizes "the close, informal relationship among law partners and associates and . . . the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment." Formal Opinion 342, n.2, 62 A.B.A. J. 517 (1976).

The inability to adequately screen is further magnified in considering that Greitzer & Locks is a small, specialized firm, comprised of two partners and four associates with the bulk of their work in asbestos litigation.

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* The additional requirements for the intra-firm screen required by the Department of Justice before it issued the waiver are set out in the District Court's opinion. (App. C at A 65-66.)

In view of this, it appears unlikely that even inadvertent disclosures can be avoided between Peterson and the disqualified attorneys regardless of the type screening mechanism used. Disqualification of the entire firm is the only effective remedy to guard against the possibility of inadvertent use of confidential information. *See Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) *overruled on other grounds* in *Armstrong* v. *McAlpin*. Even decisions strongly supportive of screening acknowledge that screening will not be adequate in all instances. *See, e.g., Sierra Vista Hospital, Inc.* v. *United States*, 639 F.2d at 749, 754 (Ct. Cl. 1981); *Armstrong* v. *McAlpin*, 625 F.2d at 446; *Kesselhaut* v. *United States*, 555 F.2d 791, 793 (1977).

In furtherance of disqualification as the only effective remedy under the facts of this case, *Armstrong* v. *McAlpin*, 461 F. Supp. 622 (S.D.N.Y. 1978), *aff'd* 625 F.2d 433 (2d Cir. 1980) (en banc) is instructive. First, the Court declared the former government attorney disqualified by DR 9-101(B). The Court next discussed vicarious disqualification and the interplay of DR 5-105(D) and Formal Opinion 342, stating that screening is available under Formal Opinion 342 *only* when an appearance of a significant impropriety is absent. *Id.* at 624. The Court also noted with approval the New York City Bar Association's Ethic Committee statement that:

> [S]ituations may arise where the firm must be disqualified due to inadequate screening of the individual attorney . . . or an appearance of impropriety that simply cannot be removed by any degree of screening when the disqualified attorney's relationship with the matter in government was extremely close and significant. *Id.*, 625.

McAlpin is particularly relevant here because (1) there has been a significant appearance of impropriety created by Mr. Peterson's switching sides *vis a vis* the degree of his involvement with asbestos litigation as a government attorney, (2) there has been inadequate screening adopted because of Peterson's involvement in asbestos litigation against these same defendants outside Virginia and (3) there was no waiver granted for at least ninety days.

The District Court found both as a matter of law and of fact the screening measures initiated by the disqualified attorneys were insufficient, given the circumstances, to prevent prejudice to the defendants or to prevent taint to the Virginia litigation. The Court disdained the cavalier and callous manner in which waiver and screening evolved, noting its emanation as an after the fact, perchance consideration by the disqualified lawyers. (App. A 51-96.) The District Court *did not* reject *all* government screens as a method of preventing imputed disqualification as petitioners suggest. (Pet. Brief. 21.) The Court's decision was based upon the unanimous decision by its three judges, who cumulatively now have over fifteen (15) years experience in the Virginia asbestos litigation.

B. The Government's Waiver Of Vicarious Disqualification Is Not Binding Upon The District Court.

The District Court had the obligation to inquire into the adequacy of the proposed screen in order to understand the basis of the waiver. This duty is non-delegable and any waiver of imputed disqualification is not binding on the Court. *See, e.g., Kesselhaut* v. *United States*, 555 F.2d 791, 794 (Ct. Cl. 1977); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976); *Trone* v. *Smith*, 621 F.2d 994, 999; *Cheng* v. *GAF*. As the District Court recognized,

> [It] is the non-delegable responsibility of this Court to see that lawyers practicing before this Court maintain the highest standards of professional conduct in the management of cases before it, and to insure that nothing, not even the appearance of impropriety, is permitted to tarnish the judicial process or shake the confidence of the public in the legal profession. (R. 583.)

Both the government (Brief of U.S. at 18 n. 6)* and the disqualified lawyers (R. 184) concede the waiver of imputed disqualification is subject to judicial review.

Formal Opinion 342 contemplates that a waiver be given by all affected parties before imputed disqualification can be avoided.[1] The record demonstrates that the interests of the manufacturers were severely impacted by Peterson's association with Greitzer & Locks. No consent or waiver was ever sought or obtained from the defendant-manufacturers.

The *raison d'etre* of Formal Opinion 342 is to allow government attorneys to enter private practice without violating the Canons of Ethics. The Government is concerned that without this guarantee, its opportunities for recruiting capable young lawyers is severely restricted. Formal Opinion 342 suggests a procedure that will allow a young attorney who wishes to enter private practice after a few years employment with the government to do so. The Opinion suggests a similar procedure for a government attorney with 17 years experience but recognizes that such switches are in part limited. The Canon's chill to freedom of movement can only be removed *if* the safeguards of the Canons are

*Amicus Curiae Brief filed by the United States in the Court of Appeals for the Fourth Circuit.

[1] *E.g., Armstrong* v. *McAplin, Kesselhaut* v. *United States,* 555 F.2d 791, 794 (Ct. Cl. 1977). *See also,* Commission on Professional and Judicial Ethics, Bar Association of the City of New York, Op. No. 889, 31 THE RECORD 552, 571 (1976).

followed. The Canons' prerequisites exist to preserve the integrity of the judicial system, and on balance such integrity must always outweigh the Government's interests in placing their former attorneys in private practice as suggested by Formal Opinion 342. That integrity balance must never be subservient to the caprice, avarice and indifference of the individual seeking the Canon's exception.

Many Courts have held that an appearance of significant professional impropriety can be the sole basis for disqualification.[8] *See In re Coordinated Pre-trial Proceedings, etc.*, 658 F.2d 1355 (9th Cir. 1981). The Ninth Circuit held:

> After carefully reviewing the policy considerations on both sides, we hold that Canon 9 alone can be the basis for a disqualification motion. In order that the court may in fact control the conduct of attorneys appearing before it, the court should have the ability to disqualify attorneys if their conduct actually interferes with the integrity of the court, or actually produces an appearance of impropriety. However, an order of disqualification by a district court that is not based on articulable principles cannot be sustained. This court will affirm such an order only where the impropriety is clear and is one that would be recognized as such by all reasonable persons . . . The impropriety must affect the public's view of the judicial system or the integrity of the court. Id. at 1360-61. (citations omitted)

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[8] Formal Opinion 342 was directed at the typical administrative practice of Washington lawyers. The concern was with an agency lawyer joining a firm which practices before that agency. However, because this litigation involves multiple parties, including the United States, to give full effect to the spirit and intent of Formal Opinion 342, *all* affected parties must consent to the waiver before the mandatory prohibition of DR 5-105 (D) can be avoided.

Despite the proposed screen and waiver, the District Court determined Peterson's association with Greitzer & Locks constituted a threat to the integrity of the Virginia litigation, constituted an unacceptable appearance of professional impropriety, and "would seriously compromise the public's perception of the integrity of this Court and shake the public's confidence in the administration of justice." (R. 591-596.) In view of these findings, Canon 9 alone warrants affirmance of the District Court's order of disqualification by refusal of the Writ of Certiorari.

V. Potential Prejudice To The Defendant-Manufacturers Is A Sufficient Basis Upon Which To Disqualify Greitzer & Locks.

The petitioners argue the District Court's findings requiring the vicarious disqualification of Greitzer & Locks were based upon pure speculation. The factual situation and the corresponding law do not support this contention. *Actual proof* of *prejudice* is not required to sustain a court's findings for imputing disqualification of a tainted attorney to his entire law firm. *Armstrong; Board of Education* v. *Nyquist*, 550 F.2d 1241, 1246, 1248 (2d Cir. 1970). *See also, Trone* v. *Smith*. All that is required for the District Court to find vicarious disqualification of Greitzer & Locks is (1) Peterson possessed information which would prejudice the manufacturers and taint the Virginia litigation if transmitted in any fashion to his new firm and (2) that there existed a *potential* for the transmission of that knowledge whether knowingly or inadvertently. *E.g. Cheng* v. *G.A.F. Corp.*, 631 F.2d 1052, 1057-1059. *See also, Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Scholetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706, 711 (7th Cir. 1978). Based upon the evidentiary hearing of February 27,

1982, the three judge panel of the District Court unanimously made both specific findings. Petitioner's contentions that the District Court's determinations were based solely upon speculation are without substance.

The disqualified lawyers rely upon *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) to demonstrate that the possibility of taint in the trial proceedings is an insufficient basis for disqualification. *Id.* at 376. This reliance is misplaced. The "concrete example" language referred to proof of irreparable harm and was in reference to the appealability of orders denying disqualification *Id.* at 376. The disqualified lawyers have taken this language entirely out of context and argue that this *dicta* should be afforded great precedential weight in the present case.

If the integrity of our judicial system and a lawyer's ethical obligations to the public, the client and the profession, are to have any practical meaning, then proof of actual prejudice must not be used as the only standard. Such would establish an unattainably high threshold for affected parties to cross and would emasculate the public policy of integrity and justice upon which the judicial system rests.

CONCLUSION

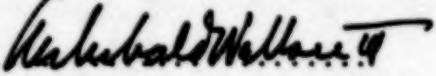
Rule 17.1 of the United States Supreme Court states the considerations this Court will consider in order to grant a Petition for a Writ of Certiorari. The judicial history of the present case does not indicate that this case should be a candidate for review. An eminently qualified panel of United States District Court Judges unanimously agreed that Greitzer & Locks should not be allowed to participate in the Virginia asbestos litigation for fear of tainting the entire litigation. This decision was affirmed by an en banc hearing of the Court of Appeals for the Fourth Circuit. Neither

Court departed from the mainstream of Federal law in making their decisions.

Petitioners argue that 260 Virginia asbestos plaintiffs have been prejudiced by the Order of Disqualification. Why then have no plaintiffs appealed that order? The sincerity behind the petitioners' petition is at best suspect, and one cannot help but wonder whose interests Greitzer & Locks are representing!

The respondents respectfully submit that the Petition for Writ of Certiorari be denied.

H. K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION;
RAYMARK INDUSTRIES, INC.;
PITTSBURG CORNING CORPORATION

By 

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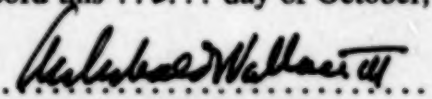
CERTIFICATE

I hereby certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to all counsel of record this 15 day of October, 1982.



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